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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 372

VIVIAN V. SIMPSON,
Secretary of State,
Annapolis, Maryland,

Petitioner,

VS.

THELMA GERENDE,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Vivian V. Simpson, Secretary of State of the State of Maryland, respectfully prays that a writ of certiorari may issue to review the final decision of the Court of Appeals in this matter:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Respondent, Thelma Gerende, among others, filed a petition for a writ of mandamus in the Circuit Court for Anne Arundel County, Maryland, setting forth, among

other things, that at a convention held by the Progressive Party of Maryland she was nominated as a candidate of that Party for the office of member of the House of Representatives of the United States from the Second Congressional District. The Respondent alleged that she had the requisite constitutional requirements for the office sought and that she had been duly nominated in accordance with the laws of Maryland by a convention of the Progressive Party of Maryland. It was further alleged that she properly proffered her certificate of nomination, together with the requisite filing fee, to the Petitioner, the Secretary of State of the State of Maryland, who refused to accept that certificiate on the sole ground that it was not accompanied by the affidavit required by Section 15 of Article 85A of the Annotated Code of Maryland, as added by Chapter 86 of the Acts of the General Assembly of Maryland of 1949, commonly known as "The Subversive Activities Act of 1949". That Section reads as follows:

> "No person shall become a candidate for election under the provisions of Article 33 of the Annotated Code of Maryland to any public office whatsoever in this State, unless he or she shall file with the certificate of nomination required by the foregoing Article, an affidavit that he or she is not a subversive person as defined in this Article; provided that, in the case of certificates of nomination for President or Vice President of the United States, the affidavit may be made on behalf of such candidates by those persons who file the certificate of nomination for such candidates. No certificate of nomination shall be received for filing by any Board of Supervisors of Elections or by the Secretary of State of Maryland unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit aforesaid."

To the petition for a writ of mandamus, the Petitioner filed a demurrer, the legal effect of which was to admit all of the allegations of fact contained in the petition for a writ of mandamus but to assert that those allegations were insufficient as a matter of law to justify the issuance of the writ. A hearing was held thereon in the Circuit Court for Anne Arundel County; and, for the reasons set forth in a memorandum filed in the case and made part of the record in this proceeding, the demurrer was sustained without leave to amend and the petition for a writ of mandamus was dismissed.

Thereafter, in accordance with the laws of the State of Maryland, an immediate appeal was taken to the Court of Appeals of Maryland since the controversy related to the ability of the Respondent to appear as a candidate on the ballots and voting machines, as distinguished from the necessity of being a write-in candidate, to be used within the Second Congressional District of Maryland at the General Election to be held on November 7, 1950. The case was argued in the Court of Appeals on October 12, 1950, and the Court of Appeals entered an immediate *per curiam* order on that date reversing the judgment of the lower court as to the Respondent, Thelma Gerende, and, in effect, directing that the Petitioner, the Secretary of State of the State of Maryland, enter the name of the Respondent on the ballots and voting machines to be used within the Second Congressional District of Maryland at the General Election to be held on November 7, 1950, without the necessity of the Respondent's filing the affidavit required by Section 15 of Article 85A of the Annotated Code of Maryland.

II.
JURISDICTIONAL STATEMENT

Petitioner brings this Petition pursuant to Section 1257 (3) of Revised Title 28 of the United States Code.

A writ of certiorari is sought to review the final decision entered on October 12, 1950, in the Court of Appeals of Maryland, which is the Court of last resort of the State of Maryland, in the cases known as No. 105, October Term, 1950, *Louis Shub v. Vivian V. Simpson, Secretary of State of the State of Maryland*, in so far as that final decision relates to the Respondent, Thelma Gerende.

The nature of the case and the rulings below which bring the case within the jurisdictional requirement of Section 1257(3) appear from the following:

In the petition for a writ of mandamus, it was specifically asserted on behalf of the Respondent, *inter alia*, that the requirement of Section 15 of Article 85A of the Annotated Code of Maryland, as added by Chapter 86 of the Acts of the General Assembly of Maryland of 1949, namely, that a candidate for the office of member of the House of Representatives of the United States file an affidavit that he or she is not a subversive person as defined in Article 85A, together with his or her certificate of nomination, is an attempt to modify and add to the qualifications for office as set forth in Article I, Section 2, Clause 2, Article I, Section 3, Clause 3 and Article I, Section 5 of the Constitution of the United States and is, hence, invalid. Other contentions relating to the invalidity of Section 15 of Article 85A based upon the Maryland Declaration of Rights and Constitution of the State of Maryland and the First and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States were also made. It should be noted also that the Respondent was one of a group of persons seek-

ing the issuance of a writ of mandamus and that the other persons were the candidates of the Progressive Party of Maryland for the offices of Governor of the State of Maryland, United States Senator from the State of Maryland and Member of the House of Representatives of the United States for the Fourth Congressional District.

The trial court, by its memorandum and Order sustaining the Demurrer to the petition for a writ of mandamus and dismissing the said Petition, held that Section 15 of Article 85A did not prescribe qualifications for Members of the House of Representatives of the United States and the United States Senate other than those laid down in the Constitution of the State of Maryland and the Constitution of the United States and, therefore, that Section 15 of Article 85A of the Annotated Code of Maryland was not invalid in that respect.

On appeal, the same claims were made by the Respondent and other persons seeking the issuance of a writ of mandamus. The Court of Appeals of Maryland on the day that argument was heard in the case filed a *per curiam* opinion, in which it held unanimously as to the Respondent that the judgment of the lower court should be reversed. The Court of Appeals dismissed the appeal as to two of the persons seeking the issuance of a writ of mandamus inasmuch as they had voluntarily taken the oath required by Section 15 of Article 85A of the Annotated Code of Maryland and, therefore, the case as to them was moot. The Court of Appeals also held, by a majority of three members (two members dissenting), that the judgment of the lower court with respect to the gubernatorial nominee of the Progressive Party of the State of Maryland should be affirmed. It is this later holding which is the subject of an appeal to this Honorable Court by one Louis Shub.

While the *per curiam* opinion of the Court of Appeals of Maryland does not set forth the reasoning of the Court and, in fact, states that an opinion setting forth its reasoning will be hereafter filed, the action of the Court of Appeals in affirming the judgment of the lower court as to the gubernatorial candidate for the Progressive Party while reversing the judgment of the lower court with respect to the Respondent, the Congressional candidate of the Progressive Party, clearly discloses the basis of the decision of the Court of Appeals of Maryland and clearly indicates that the Court of Appeals of Maryland held that Section 15 of Article 85A constitutes an invalid amplification, modification and amendment of Article I, Section 2, Clause 2, Article I, Section 3, Clause 3 and Article I, Section 5 of the Constitution of the United States.

III.

QUESTION PRESENTED

The question for review upon certiorari is:

(1) Does Section 15 of Article 85A of the Annotated Code of Maryland, as added by Chapter 86 of the Acts of the General Assembly of Maryland of 1949, constitute an unlawful and unconstitutional modification, addition and amplification of Article I, Section 2, Clause 2, Article I, Section 3, Clause 3 and Article I, Section 5 of the Constitution of the United States by adding to the qualifications of Members of the House of Representatives of the United States?

The Court of Appeals of Maryland, in reversing the judgment of the Circuit Court of Anne Arundel County as to the Respondent, Thelma Gerende, found in the affirmative as to the above question.

In this finding and conclusion, it is submitted there was error.

IV.

REASONS FOR GRANTING THE WRIT

The reasons relied on for the affirmance of a writ of certiorari in this case are summarized as follows:

(1) The Court of Appeals of Maryland has decided a Federal question of substance not theretofore determined by this Court. The question was that the requirement that a candidate for election as a Member of the House of Representatives of the United States file an affidavit with the Secretary of State of the State of Maryland that he or she is not a subversive person within the meaning of Article 85A of the Annotated Code of Maryland, as a prerequisite to the right of the candidate to have his or her name appear upon the ballots and voting machines to be used within the Congressional District from which he or she is to be elected, constitutes an unlawful and unconstitutional modification, extension and addition to the requirements for Members of the House of Representatives as prescribed by the Constitution of the United States.

(2) The Court of Appeals of Maryland has decided a Federal question of first impression in a way not necessarily or even logically in accord with the applicable decisions of this Court in that it has denied to the Legislature of the State of Maryland its authority under Article I, Section 4, Clause 1 of the Constitution of the United States to prescribe the manner of holding elections for Senators and Representatives by holding that the procedural requirement that a candidate for Representative furnish an oath as a condition precedent to having his name printed on the ballot or placed on the voting machine is an additional qualification for office, notwithstanding that such candidate may run as a write-in candidate without furnishing such oath.

(3) The Court of Appeals of Maryland has thrown doubt upon the validity of the entire election machinery prescribed by the laws of the State of Maryland, in so far as it relates to the election of Members of the House of Representatives of the United States and Members of the United States Senate, in that the Court of Appeals, while holding that a candidate for one of such offices may not constitutionally be required to file an oath that he or she is not a subversive person, within the meaning of Article 85A of the Annotated Code of Maryland, has necessarily brought into question the validity of various portions of Article 33 of the Annotated Code of Maryland, which require candidates for either of these offices to pay certain prescribed filing fees, to file certain certificates of nomination and to be nominated in certain ways.

V.

TRANSCRIPT OF RECORD AND SUPPORTING BRIEFS

Petitioner relies upon the record in the appeal filed by Louis Shub against Vivian V. Simpson, Secretary of State of the State of Maryland, in this Honorable Court; the said Louis Shub, Appellant, being one of the persons, together with the Respondent herein, Thelma Gerende, who sought the issuance of a writ of mandamus in the Circuit Court for Anne Arundel County and who appealed the judgment of the Circuit Court for Anne Arundel County dismissing said petition to the Court of Appeals of Maryland. The record in said appeal constitutes a record of all of the proceedings had in the matter of the instant case. Petitioner also submits herewith a Brief in Support of this Petition.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Maryland, commanding that Court to certify and to send to this

Court for its review and determination the record and all proceedings in the case numbered and entitled on its docket as No. 105, October Term, 1950, *Louis Shub, et al. v. Vivian V. Simpson, Secretary of State*, in so far as said record and proceedings relate to the Respondent, Thelma Gerende, and that the said judgment of the Court of Appeals of Maryland as to the Respondent, Thelma Gerende, may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

AND your Petitioner will ever pray.

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J. EDGAR HARVEY,
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HARRISON L. WINTER,
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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The Opinion of the Court of Appeals has not yet been reported officially. It, together with the opinion of the Circuit Court for Anne Arundel County, appears in the transcript of record.

JURISDICTION

The statutory provision is Section 1257(3), Revised Title 28, United States Code.

The final decision of the Court of Appeals of Maryland reversing, as to the Respondent, Thelma Gerende, the judgment of the Circuit Court for Anne Arundel County was

entered on October 12, 1950. The Court of Appeals of Maryland is the court of last resort for the State of Maryland; and, as such, meets the test of Section 1257(3), Revised Title 28, United States Code, and Rule 38 of this Honorable Court.

JURISDICTIONAL STATEMENT

The attention of the Court is respectfully directed to the Jurisdictional Statement contained in the Petition for a writ of certiorari, *supra.*

STATEMENT OF FACTS

The attention of the Court is respectfully directed to the Summary Statement of the Matter Involved contained in the Petition for a writ of certiorari, *supra.*

ERRORS BELOW RELIED ON HERE

Petitioner relies on the following point:

The requirement of Section 15 of Article 85A of the Annotated Code of Maryland, as added by Chapter 86 of the Acts of the General Assembly of Maryland of 1949, that a candidate for Member of the House of Representatives of the United States and the United States Senate submit, as a condition precedent to the appearance of the name of such candidate on the printed ballot and voting machines, an affidavit that he or she is not a subversive person, as defined in Article 85A of the Annotated Code of Maryland, does not constitute the establishment of unlawful and unconstitutional additional qualifications for Members of the House of Representatives of the United States and the United States Senate in violation of Article I, Section 2, Clause 2, Article I, Section 3, Clause 3 and Article I, Section 5 of the Constitution of the United States.

ARGUMENT

I.

THE OATH REQUIRED BY SECTION 15 OF ARTICLE 85A DOES NOT IMPOSE ADDITIONAL QUALIFICATIONS FOR MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES AND THE UNITED STATES SENATE.

The text of Section 15 has been set forth in the petition for certiorari. Briefly, it states that no person shall become a candidate for election under the provisions of Article 33 of the Annotated Code of Maryland (the Elections Article of the Maryland Code) unless he or she shall file with the certificates of nomination an affidavit that he or she is not a subversive person, as defined in Article 85A of the Annotated Code of Maryland, as added by Chapter 86 of the Acts of the General Assembly of Maryland of 1949. That definition is as follows:

> "'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the Government of the United States, or of the State of Maryland, or any political subdivsion of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

Section 15 further states that no certificate of nomination shall be received for filing by any Board of Supervisors of Elections (with respect to local offices) or by the Secretary of State of Maryland (with respect to State-wide and Federal offices) unless accompanied by such an affidavit, and the statute directs that there shall not be entered upon any

ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit.

At the outset, it should be noted that Article VI, Clause 3 of the Constitution of the United States requires Senators and Representatives to make oath that they shall support the Constitution of the United States. It seems a fair conclusion that the oath required by Section 15 of Article 85A is no broader in scope than that prescribed by the Constitution of the United States in Article VI, Clause 3 thereof.

To understand properly the effect of the oath required by Section 15, it is necessary to consider in general terms the machinery provided by Article 33 of the Annotated Code of Maryland with respect to nominations and elections. Nominations may be effected in two ways: by convention and by nominating petition. Nominations by party convention may follow a primary election or be made without a primary election (Sections 37, 38 and 58 of Article 33 of the Annotated Code of Maryland, 1947 Supplement). Nominations by nominating petitions are made by filing a certificate of nomination, together with a statement containing the signatures of designated numbers of persons that they intend to vote for the person sought to be nominated by petition (Section 39 of Article 33, *supra*). However, notwithstanding the two ways in which nominations may be made, the electorate of the State of Maryland at every general election has the right to vote for persons other than those nominated by writing in the name of the candidate of their choice on paper ballots or on voting machines. Section 62 of Article 33, *supra*, specifically directs that appropriate blank spaces be prepared on paper ballots, and Section 87 of Article 33, *supra*, specifically states that voting machines shall permit each voter, at other than primary elections, to vote from independent nomination. Thus, the Maryland law relating

to elections preserves to each member of the electorate at a general election the right to vote for a candidate of his own choice, regardless of the names appearing on the official ballot of persons nominated by the various political parties or by nominating petition.

The Court of Appeals of Maryland has zealously guarded this right. In *Jackson v. Norris,* 173 Md. 579 (1937), an Act of the General Assembly which purported to eliminate the provisions of former statutes for blank spaces on official ballots in which voters might insert the names of those for whom they wish to vote regardless of nominations by political parties or independent nominations was declared unconstitutional, and it was held also that an administrative agency established in Baltimore City to purchase voting machines might purchase only such machines as provide the opportunity to a voter to cast a vote for one other than a candidate whose name appears on the official ballot.

With this background, it clearly appears that Section 15 of Article 85A, *supra,* applies only to candidates who are nominated by party convention, as a result of a primary election, or, in the absence of a primary election, and candidates who are nominated by nominating petition. In other words, Section 15 of Article 85A, *supra,* applies only to the candidates whose names appear on the official ballot at any general election. It does not apply to any candidate who might be a write-in candidate. Thus, a candidate for Member of the House of Representatives of the United States or for the United States, without furnishing the oath required by Section 15 of Article 85A, *supra,* may place his candidacy before the electorate as a write-in candidate.

It is not to be thought that the ability to run as a write-in candidate is an illusory right. In 1948, the States' Rights

Democratic Party (commonly called the Dixiecrats) was unsuccessful in having the names of its candidates for President and Vice President appear on the official ballot of the State of Maryland because of its failure to file a nominating petition within the time prescribed by law, *Vaughan v. Boone*, ... Md. ..., 62 A. (2d) 351 (1948). Consequently, the candidates of that Party for President and Vice President were forced to run as write-in candidates. Notwithstanding that fact, however, the candidate for President polled 2,476 votes, while the Socialist candidate for President, whose name appeared on the official ballot, polled a total of 2,941 votes.

The mere recitation of the limited scope of the oath required by Section 15 of Article 85A, *supra*, is sufficient, it is submitted, to demonstrate that it does not constitute an additional qualification for Member of the House of Representatives of the United States or of the United States Senate. Rather, the oath represents the exercise by the Legislature of the State of Maryland of the authority permitted it by Article I, Section 4, Clause 1 of the Constitution of the United States, in that it constitutes a vaild regulation relating to the manner of holding elections for Senators and Representatives. Essentially, Section 15 of Article 85A, *supra*, does not create an additional qualification for Senators and Representatives because it is not compulsory, by virtue of the write-in provisions of the Maryland election laws, that a Senator or Representative subscribe to the oath.

No case in this Court is known which adjudicates the contentions presented herein or constitutes a precedent to show the error of the Maryland Court of Appeals. Many cases, however, in the State Courts show that a requirement of the election laws of a particular State does not constitute an additional unconstitutional qualification for Representa-

tives or Senators where the electorate clearly has the right to vote for a write-in candidate who is not compelled to meet that requirement.

In many of the States, as in Maryland, there are provisions prohibiting the printing of the name of a defeated candidate in a primary election on the official ballot, at the subsequent general election as an independent nominee (See Sec. 39 of Article 33, *supra*). Uniformly, where the electorate has the right to write-in the name of the defeated candidate, notwithstanding the non-appearance of his name on the official ballot, it has been held that the statute prohibiting the printing of the defeated candidate's name on the official ballot does not constitute an additional unlawful qualification for Representatives or Senators, *Winston v. Moore*, 244 Pa. 447, 91 A. 520 (1914); *Wasson v. Woods*, 265 Pa. 442, 109 A. 214 (1919); *Baughn v. Eure*, 91 Neb. 31, 135 N. W. 224 (1912); *McCarthy v. Moore*, 87 Minn. 308, 92 N. W. 4 (1902); *Jackson v. State*, 102 Miss. 663, 59 So. 873 (1912). Where, however, the electorate has no right to vote for a write-in candidate, a different result necessarily follows because the requirement constitutes an additional qualification for a Representative or Senator, *Broughton v. Pursifull*, 245 Ky. 137, 53 S. W. (2d) 200 (1932); *State v. Thorson*, 6 N. W. (2d) 89, 143 A. L. R. 599 (N. Dak., 1942); *Elkwall v. Stadelman*, 146 Ore. 439, 30 P. (2d) 1037 (1934); *In Re O'Connor*, 17 N. Y. S. (2d) 758 (1940); *State v. Schmahl*, 140 Minn. 219, 167 N. W. 481; *State, ex. rel Johnson v. Crane*, 147 P. (2d) 864 (Wyo., 1948).

It is respectfully submitted that since it has been amply demonstrated that the oath required by Section 15 of Article 85A, *supra*, is not necessarily required of every candidate for Representative or Senator, the oath cannot be construed as an additional qualification for Representative and Sena-

tor in violation of the various provisions of Article I of the Constitution of the United States. Rather, the oath falls within the permissible scope of the authority of the General Assembly of Maryland, as contained in Section 4 of Article I of the Constitution of the United States.

II.

THE ERROR OF THE COURT OF APPEALS OF MARYLAND THROWS DOUBT ON THE ENTIRE VALIDITY OF THE MARYLAND ELECTION MACHINERY, AS WELL AS THE ELECTION MACHINERY OF OTHER STATES.

The Maryland Court of Appeals has unquestionably decided that the oath required by Section 15 of Article 85A, *supra*, constitutes an additional unconstitutional qualification for Representatives or Senators, notwithstanding that the oath does not apply to write-in candidates. The Maryland law, as well as the election laws of the other States, is replete with conditions relating to candidates other than write-in candidates. The validity of those conditions is seriously questioned by the decision of the Court of Appeals in the instant case.

Among other things, the Maryland law requires that candidates for nomination by Party convention or by independent nominating petition pay certain designated filing fees. If it be said that a candidate for nomination by party convention or by independent nominating petition must possess an additional qualification if he be required to take the oath prescribed by Section 15 of Article 85A, *supra*, by the same token, it logically follows that he must possess the requisite filing fee. Article I of the Constitution of the United States no where prescribes possession of a filing fee as a necessary qualification for Representatives or Senator, and, consequently, under the theory of the Court of Appeals of Mary-

land, the exaction of a filing fee would seem to be an unconstitutional assertion of legislative power.

The same argument is applicable to innumerable provisions of the Maryland election laws, the counterpart of which are found in the election laws of many of the other States. Included in such provisions would be the Maryland requirement that a nominee of a party convention run solely on behalf of the particular political party nominating him, that a nominee by independent nominating petition have the signatures of a certain designated number of persons sponsoring his candidacy, that a person defeated in a primary election may not be subsequently nominated by nominating petition, that certificates of nomination be under oath, that certificates of nomination be filed within a certain designated period of time prior to the general election. Enumeration of all of these various provisions would serve no useful purpose, but enumeration of a few serves to demonstrate the importance of this Court's exercising its supervisory power to release the Court of Appeals of Maryland from the bonds of error into which it has placed itself.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the relief prayed in the petition for the issuance of a writ of certiorari should be granted and the decision of the Maryland Court of Appeals, in so far as it applies to the Respondent, Thelma Gerende, should be reversed.

Respectfully submitted,

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CERTIORARI DENIED